

	<b>Effective Date:</b>		09-12-2011
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	<b>Supersedes:</b>		
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## **PURPOSE**

The purpose of this policy is to assure compliance by all state operated health facilities, hospitals and centers with applicable state and federal laws and regulations relative to the use and disclosure of confidential information and privileged communications.

## **DEFINITIONS**

"Confidential Information" means all information in the record of a recipient and all other Information acquired in the course of providing mental health services to the recipient.

"Consanguinity" means kinship by blood, i.e., blood relationship. This level of Consanguinity in descending order would be child, grandchild, and great-grandchild of the recipient; in ascending order would be parent, grandparent to great-grandparent of recipient; in collateral order would be cousin, nephew/niece to second cousin, great nephew/niece.

"Holder of the record" means the director of LARA or his/her designee which, for the purposes of this policy, is the director of a state operated hospital, center or facility.

"Privileged communication" means a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis or treatment of a patient or to another person while the other person is participating in the examination, diagnosis or treatment or a communication made privileged under other applicable state or federal law.

## **POLICY**

Information in the record of a recipient and other information acquired in the course of providing mental health services to a recipient, shall be kept confidential, shall not be open to public inspection, and shall be disclosed only in the circumstances and under the conditions set forth in this policy.

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## **PROCEDURE**

### **I. CONFIDENTIAL INFORMATION:**

- A. [MCLA 330.1748, MCLA 330.1749 and MCLA 330.1750](#) shall be a part of the record for each person receiving mental health services from the state or any of its contracted mental health service providers with the exception of community mental health service programs.
- B. If confidential information is to be disclosed, the identity of the individual to whom it pertains shall be protected and shall not be disclosed unless it is germane to the authorized purpose for which disclosure was sought and when practicable, no other information shall be disclosed unless it is germane to the authorized purpose for which disclosure was sought, i.e., disclosure based upon an authorized purpose and the requestor's "need to know."
- C. Any person receiving confidential information shall disclose that information to others only to the extent consistent with the authorized purpose for which the information was obtained.
- D. A record shall be kept of disclosures and shall include all of the following:
  - 1) Information released
  - 2) To whom it was released
  - 3) The purpose claimed by the person requesting the information and a statement describing how the disclosed information is germane to that purpose
  - 4) The provision of MCLA 330.1748, or other state law, under which disclosure was made
  - 5) A statement that the receiver of disclosed information was informed that further disclosure must be consistent with the authorized purpose for which the information was released, and
  - 6) In circumstances where consent is required, documentation that such consent was obtained from the recipient or his/her legally authorized representative.

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E. Except as otherwise provided in subsections 5), 6) and 7), when requested, confidential information shall be disclosed only under one or more of the following circumstances: **(MANDATORY DISCLOSURE):**

- 1) For case record entries made subsequent to March 28, 1996, confidential information in the recipient's record shall be disclosed to an adult recipient, upon his/her request, if the recipient does not have a guardian and has not been adjudicated legally incompetent. The holder of the record shall comply with the adult recipient's request for disclosure as expeditiously as possible but in no event later than the earlier of 10 days after receipt of the request or, if the recipient is receiving treatment from the holder of the record, before the recipient is released from treatment.
- 2) Pursuant to orders of a court of record, subpoenas accompanied by any necessary authorizations to release the information, or subpoenas of the legislature, unless the information is made privileged by law.
- 3) To a prosecuting attorney as necessary for him/her to participate in a proceeding governed by the Mental Health Code
- 4) To an attorney retained by or appointed to represent the recipient, with the consent of the recipient, the recipient's guardian with authority to consent, or the parent with legal and physical custody of a minor recipient.
- 5) If necessary to comply with another provision of law, e.g., Children's Protective Services Act.
- 6) To the Department if the information is necessary in order for it to discharge a responsibility placed upon it by law.
- 7) To the office of the auditor general if the information is necessary for that office to discharge its constitutional responsibility.
- 8) To a surviving spouse of the recipient, or if there is no surviving spouse, to the individual or individuals most closely related to the deceased recipient within the third degree of consanguinity (blood relationship) for the purpose of applying for and receiving benefits only if the spouse or closest relative has been designated the personal representative or has a court order.
- 9) To the Department of Human Services (DHS) Children's Protective

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Services caseworker/administrator within 14 days following receipt of his/her written request for mental health records and information pertinent to his/her investigation of child abuse or child neglect. (MCLA 330.1748a)

F. Except as provided in Subsection A (4)a. preceding, confidential information may be disclosed if consent is obtained from the recipient, the recipient's guardian with authority to consent, the parent with legal custody of a minor recipient, or the court appointed personal representative or executor of the estate of a deceased recipient to all of the following: **(DISCRETIONARY DISLOSURE WITH CONSENT)**

- 1 Providers of mental health services to the recipient,
- 2 The recipient or his/her guardian or the parent of a minor or any other individual or agency unless in the written judgment of the holder of the record, the disclosure would be detrimental to the recipient or others. Procedures for the withholding of information based upon potential detriment to the recipient or others include at a minimum:
  - a. Review of the request and determination as to detriment by the individual in charge of the recipient's plan of service. A determination of detriment shall not be made if the benefit of disclosure outweighs the detriment to the recipient. If the record is located on-site, a determination of detriment shall be made within three business days from the date of the request. If the record is located at another site, the determination shall be made within 10 business days from the date of the request.
  - b. Written documentation as to the justification for withholding information.
  - c. A determination as to whether part of the information requested can be released without detriment.
  - d. If a determination of detriment has been made and the person seeking disclosure disagrees with that decision, he or she may file a recipient rights complaint with the Director's Office.

G. Confidential information may be disclosed in the discretion of the holder of

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the record without the consent of the recipient, legally empowered guardian, or parent with legal custody of a minor recipient: **(DISCRETIONARY DISCLOSURE)**

- 1 As necessary in order for the recipient to apply for or receive benefits only if the benefits shall accrue to the state or shall be subject to collection for liability for mental health service.
  - 2 As necessary for the purpose of outside research, evaluation, accreditation, or statistical compilation, provided that the recipient can be identified from the disclosed information only if:
    - a) Such identification is essential in order to achieve the purpose for which the information is sought, or
    - b) If preventing such identification would clearly be impracticable; but, in regard to this subsection and (i) preceding, in no event if the recipient is likely to be harmed by the identification.
    - c) To providers of mental or other health services or a public agency if there is a compelling need for disclosure based upon a substantial probability of harm to the recipient or other individuals.
- H. If required by federal law, the DCH or a DCH operated hospital, center or facility shall grant a representative of the Michigan Protection and Advocacy Services (MPAS) access to the records of its recipients in accordance with federal law and Section 748 (8) of the Michigan Mental Health Code, being PA 258 of 1974 as amended by PA 290 of 1995.
- I. The records, data, and knowledge collected for or by individuals or committees assigned a peer review function are confidential, shall be used only for the purposes of peer review, are not public records, and are not subject to court subpoena. This subsection does not prevent disclosure of individual case records pursuant to this directive.

## II. PRIVILEGE COMMUNICATION

- A. Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings

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preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section.

**B. Privileged communications shall be disclosed upon request under one or more of the following circumstances:**

- 1) If the privileged communication is relevant to a physical or mental condition of the patient that the patient has introduced as an element of the patient's claim or defense in a civil or administrative case or proceeding or that, after the death of the patient, has been introduced as an element of the patient's claim or defense by a party to a civil or administrative case or proceeding.
- 2) If the privileged communication is relevant to a matter under consideration in a proceeding governed by this act, but only if the patient was informed that any communications could be used in the proceeding.
- 3) If the privileged communication is relevant to a matter under consideration in a proceeding to determine the legal competence of the patient or the patient's need for a guardian but only if the patient was informed that any communication made could be used in such a proceeding.
- 4) If in a civil action by or on behalf of the patient or a criminal action arising from the treatment of the patient against the mental health professional for malpractice.
- 5) If the privileged communication was made during an examination n ordered by a court, prior to which the patient was informed that a communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered.
- 6) If the privileged communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with the competence of the patient to stand trial.

**C. In a proceeding in which subsections a. and b. above prohibit disclosure of communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, the fact the patient has been examined or treated or undergone a diagnosis also shall not be disclosed unless that fact is relevant to a determination by a health care**

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insurer, health care corporation, non-profit dental care corporation, or health maintenance organization of its rights and liabilities under a policy, contract, or certificate of insurance or health care benefits.

- D. Each department hospital, center or facility shall develop written protocols for disclosing privileged communications pursuant to duty to warn which complies with Section 946 of the Michigan Mental Health Code, specifically MCL 330.1946 (1) - (5).
- E. The holder of the record, when authorized to release the entire medical and clinical record for clinical purposes by the recipient or the recipient's guardian or parent of a minor recipient, shall release a copy of the medical and clinical record in its entirety to the provider of mental health services. Reasonable charges for copying the record may be assessed to the requestor.
- F. A recipient, guardian, or parent of a minor recipient, after having gained access to treatment records, may challenge the accuracy, completeness, timeliness, or relevance of factual information in the recipient's record.
  - 1) The recipient, guardian, or parent of a minor recipient shall be allowed to insert into the record a statement correcting or amending the information at issue.
  - 2) The statement above shall become part of the record.

## **REFERENCES**

[Michigan Mental Health Code](#)

MDCH Administrative Rule 330.7051

[Health Insurance Portability and Accountability Act \(HIPAA\), 45 CFR Parts 160 and 164](#)